

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 76-1371

To be argued by  
BARBARA J. AMBLER

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

Docket No. 76-1371

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UNITED STATES OF AMERICA,

*Appellant,*

—v.—

SALVATORE COLETTA,

*Defendant-Appellee,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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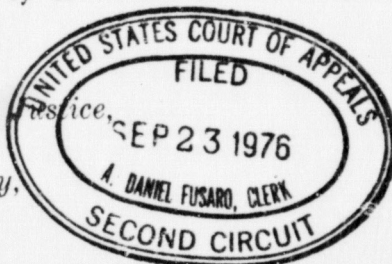
**BRIEF FOR THE UNITED STATES OF AMERICA**

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

The United States of America appeals pursuant to Title 18, United States Code, Section 3731, from an order of the Honorable Henry F. Werker, United States District Judge, entered in the United States District Court for the Southern District of New York on July 7, 1976, granting the motion of defendant Salvatore Coletta to dismiss Indictment 74 Cr. 289.

This indictment, filed in twelve counts on March 21, 1974, charged Salvatore Coletta and co-defendants George Gamaldi and Blaise Iovino with four counts each of tax evasion for the years 1968, 1969, 1970 and 1971, in violation of Title 26, United States Code, Section 7201. Specifically, each defendant was charged with failing to report income received in the form of cash kickbacks in connection with his employment as a meat buyer for Hills Supermarkets.

On October 17, 1974 Judge Werker granted a severance as to each defendant. The trial of George Gamaldi commenced on November 17, 1975. On November 19, 1975 Judge Werker dismissed the indictment as to Gamaldi at the close of the Government's case. Although Judge Werker dismissed three of the four counts on the ground that the Government failed to prove venue, he dismissed the fourth count and stated he would have dismissed all of the counts regardless of the venue question, because he believed the Government's evidence to be so speculative that a reasonable juror could not fairly conclude guilt beyond a reasonable doubt. (Tr. 361).\*

On December 17, 1975 the Government filed a notice of appeal from the decision of Judge Werker. However, after determining that such an appeal was barred by double jeopardy, the Government moved on February 9, 1976 to dismiss its appeal. On February 13, 1976 the appeal was dismissed.

On April 7, 1976, at the suggestion of the Government and with the agreement of Judge Werker and defense counsel, the defendant Salvatore Coletta made a pre-trial motion to dismiss Indictment 74 Cr. 289 as to him, based on the ground that the Government's evidence as set forth during the trial of Gamaldi failed to establish a *prima facie* case. (A. 16-24). At that time the Government and the defendant stipulated that the evidence offered at the trial of George Gamaldi was similar in all material respects to the evidence that the Government would offer against Salvatore Coletta. (A. 25).

On July 7, 1976 Judge Werker dismissed the indictment holding that there was insufficient evidence for a

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\* "Tr." refers to the trial transcript in the case of *United States v. George Gamaldi*; "A." refers to the appellant's appendix.

reasonable person fairly to conclude beyond a reasonable doubt that the defendant Coletta was guilty of the crimes charged.

The Government appeals from the dismissal of the indictment.

### Statement of Facts

#### A. The Gamaldi Trial Record

The Government's principal evidence at trial was the testimony of Moe Steinman and that of his brother, Sol Steinman. During the period charged in the indictment, Moe Steinman was employed as head of labor relations for Daitch Shopwell Supermarkets. He was also, however, the main salesman for Trans-World, Hersol and Antor meat brokerage companies. (Tr. 36). These companies, which were owned by Herbert Newman and Sol Steinman, sold "offals," a term in the meat trade that includes beef livers, oxtails, tripe, skirt steaks, flank steaks and corned beef. The Steinmans' customers were several of the large supermarket chains, including Hills, Waldbaum, Daitch-Shopwell, King Cullen, Bohack, Grand Union, First National and Sloans. (Tr. 37).

At the beginning of 1968, Hills Supermarkets was Trans-World's largest customer. Moe Steinman sold Trans-World's meat to Hills through George Gamaldi who was in charge of Hills' meat operations. (Tr. 38). As part of this relationship, Steinman paid Gamaldi kick-backs for giving Hills' meat business to Trans-World. (Tr. 41).\*

\* It was stipulated that Hills purchased the following amounts of meat from the Steinmans' three companies:

	<i>Hersol</i>	<i>Antor</i>	<i>Trans-World</i>
1968	\$103,287.00	\$ 92,562.00	\$ 894,682.00
1969	96,240.00	159,202.00	1,260,778.00
1970	153,862.00	254,832.00	1,418,924.00
1971	—	—	1,645,678.00 (Tr. 174).



In February, 1968, Hills Supermarkets merged with Great Eastern Supermarkets. In connection with the merger, Salvatore Coletta, a vice president of Great Eastern, and Blaise Iovino, a meat buyer for Great Eastern, were to take over the meat department at Hills. (Tr. 39; 195). On February 23, 1968, Moe Steinman met Salvatore Coletta and Blaise Iovino at the El San Juan Hotel, Puerto Rico. (Tr. 41). At this meeting Steinman explained to Coletta and Iovino that he had been doing business with Hills and had paid kickbacks to the previous Hills' meat buyer, George Gamaldi. The three men agreed to meet again back in New York to talk further. (Tr. 41). Once back in New York Steinman told them he was prepared to continue to pay kickbacks to them in order to keep Hills' meat business. The three men agreed that Steinman would pay from three to six cents per pound of meat, depending on the item, to Coletta and Iovino for each pound bought from Trans-World by Hills-Great Eastern. (Tr. 44; 36). The kickback scheme went into practice in the month of March, 1975 and the first payment of approximately \$14,000.00 was made by Moe Steinman to Salvatore Coletta and Blaise Iovino during the first week of April at a restaurant on Long Island. (Tr. 45; 47, 206-207).

Meanwhile, Steinman kept up his contact with George Gamaldi, reporting back to him the progress of his conversations with Iovino and Coletta. (Tr. 42-45). After the April payoff meeting Steinman told Gamaldi that Iovino and Coletta had talked about giving Gamaldi a "piece of the take" and advised Gamaldi that Coletta and Iovino would take him in as a "third equal partner", if he sat still and waited until they came to him. (Tr. 47; 48).

During the first week of May, 1968 Steinman again met with Coletta and Iovino and learned from them that

they planned to give George Gamaldi "the third kickback." And, in June of 1968 when Steinman delivered approximately \$16,000.00 in cash kickbacks for the Hills' business, George Gamaldi was present with Salvatore Coletta and Blaise Iovino for the delivery. (Tr. 49).

From approximately June of 1968 until the end of 1971, during the first ten days of each month, Moe Steinman continued to pay an average of \$23,000 in cash kickbacks to the three supermarket executives to secure the purchase of meat by Hills from Steinman's wholesale meat companies. (Tr. 49-50; 202). Moe Steinman received the cash for these payoffs each month from his brother Sol, who in turn obtained it through the device of a phony invoice and check cashing scheme. (Tr. 275). Moe Steinman would meet with all three men, or with at least two out of the three, at various places in Long Island and Manhattan to pay them the cash kickback. These locations included Patrick's Pub, Scoopies' Diner, the North Shore Restaurant, and a "motel on Exit 51", (all on Long Island), as well as Andre's, the Luxor Baths and Steinman's apartment, (all located in Manhattan). Payments were also made at Salvatore Coletta's home. (Tr. 50-51).

The amount of the kickback was determined from records Sol Steinman kept of the tonnage of meat which Hills purchased. Sol Steinman would give this monthly record to his brother Moe. (Tr. 51; 273).<sup>\*</sup> George Gamaldi kept the monthly records for the Hills' buyers and Sol Steinman would call Gamaldi each month to compare their figures and to reconcile any error as to the total amount of the kickback. (Tr. 204; 273). Sol Stein-

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<sup>\*</sup> Moe Steinman estimated that he paid from 7 to 10 cents per pound to Coletta, Iovino and Gamaldi on a volume of approximately 250,000 pounds of meats per month. (Tr. 57-58).

man would call Gamaldi or Iovino weekly to take Hills' meat orders and to ask what amount they wanted added on to the price for a kickback. (Tr. 272).

At a particular meeting at the Luxor Baths in Manhattan, in the beginning of 1969, Moe Steinman met with Gamaldi, Iovino and the defendant Coletta, and they agreed to adopt the code word "street" when ordering meat over the telephone. "Street" was to be used by the buyers to indicate to the Steinmans the amount of pennies per pound of kickback they wanted added on to Trans-World's sale price. For example, if Steinman wanted to charge sixty cents for an item and the Hills' buyers decided they wanted a five cent kickback they agreed to tell Steinman they would meet him on 5th Street or 65th Street. (Tr. 56; 278-9).

In late 1970 or 1971 Moe Steinman paid one of the regular monthly cash payments to Gamaldi, Iovino and Coletta at Coletta's home, in the presence of Sol Steinman. At this meeting both Moe and Sol Steinman saw the three buyers split the cash payment into three equal stacks. (Tr. 60-61; 276-77).

## **B. The Stipulation**

It was stipulated for purposes of the dismissal motion in the court below that the tax returns of Salvatore Coletta for 1968 through 1971 were prepared in the Southern District of New York and that Coletta reported no income from kickbacks. Furthermore, just as at the Gamaldi trial, at a trial of the defendant Coletta, an expert witness from the Internal Revenue Service could be expected to testify that if Coletta received and failed to report one third of the monthly kickbacks described by Steinman, his returns would show a deficiency in the tax



paid for each of these years. (Tr. 329-30; GX 7). Similarly, at a trial of defendant Coletta, the accountant who prepared his returns could be expected to testify that Coletta did not inform him of his kickback income. (Tr. 21-24).

### C. Judge Werker's Opinion and Findings

In deciding that the Government's proof was inadequate under the standard set forth in *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972), Judge Werker made the following findings:

(1) the Government was unable "to document the specifics of who was involved, how much was paid, and where and when payment took place . . ." (A. 55); (2) that Moe Steinman, the Government's main witness, was uncorroborated and that with respect to the time and place of payments, his testimony was nullified on cross-examination (A. 57);\* and (3) that proof of the actual receipt of funds by Coletta, even though circumstantial evidence, was missing (A. 58). Judge Werker also relied

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\* For this proposition Judge Werker cited that part of Steinman's cross-examination where he contradicted his direct testimony that the April kickback meeting was at Patrick's Pub, stating instead that the April meeting occurred at "one of the restaurants in Long Island"; that it was the May meeting that had occurred at Patrick's Pub; and finally that he didn't remember where they met in May except that it was on Long Island. (Tr. 206-07). This testimony was given in 1975 about meetings which occurred during 1968. A jury could have found that Steinman's confusion on this point substantially impeached his credibility; but it was at least as likely that a jury would have found that it did not nullify the heart of his testimony, unshaken on cross-examination, that monthly payments were made to the buyers from April 1968 through 1971, and that these payments averaged \$23,000.00 per month.

heavily upon *United States v. Bethea*, 442 F.2d 790 (1971), the facts of which he found analogous. In *Bethea* the defendant's conviction was reversed where the Government's case consisted of proof that the defendant was found sitting in a parked car in close proximity to a quantity of drugs.

## ARGUMENT

### The District Court Improperly Dismissed the Indictment.

In dismissing the indictment against Coletta, the district court improperly usurped the fact-finding function traditionally vested in the trial jury.\* Judge Werker correctly recognized that he was called upon to "determine whether upon the evidence . . . a reasonable mind might fairly conclude guilt beyond reasonable doubt", and that in so doing, he was required to view the evidence in the light most favorable to the Government, giving "full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *United States v. Taylor*, *supra*, 464 F.2d at 243. See also *United States v. De Garces*, 518 F.2d 1156 (2d Cir. 1975); *United States v. Brooks*, 349 F. Supp. 168, 171 (S.D.N.Y. 1972); *United States v. Beigel*, 254 F. Supp. 923 (S.D.N.Y.), *aff'd* 370 F.2d 751 (2d Cir.), *denied*, 387 U.S. 930 (1966). However, having properly

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\* Judge Werker granted Coletta's pre-trial motion to dismiss the indictment under the provisions of Rule 12(b), Fed. R. Crim. P., on the basis of stipulated facts, which included a transcript of the proceedings in the previous trial of George Gamaldi. The Government is entitled to appeal the dismissal under the provisions of 18 U.S.C. § 3731. *Serfass v. United States*, 420 U.S. 377 (1975).

acknowledged this standard, the district court failed, we submit, to apply it.

To sustain its burden of proof under Title 26, United States Code, Section 7201, the Government was required to establish three elements: the existence of a substantial tax deficiency; some affirmative act constituting an evasion or an attempted evasion of income taxes; and wilfulness. *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Lawn v. United States*, 355 U.S. 339, 361 (1958); *Spies v. United States*, 317 U.S. 492 (1943). The first element, namely, the existence of a substantial tax deficiency, was proved by the testimony of Moe Steinman, Sol Steinman, an IRS expert, and by the personal income tax returns filed by Coletta during the years in question. Moe Steinman testified that he paid approximately \$23,000 in cash to all three buyers, or at least two of the three buyers, at monthly payoff meetings held during each month from June 1968 through 1971. (Tr. 49-51; 202). Moe Steinman also testified that Iovino and Coletta spoke to him about giving Gamaldi a "piece of the take" at the April 1968 payoff meeting and that they told him they were going to give him (Gamaldi) "the third kickback" at the May 1968 payoff meeting. (Tr. 47; 49). Both Moe and Sol Steinman testified that at a particular meeting attended by all three buyers, including the defendant, they saw the buyers divide the kickback payment into three equal parts. (Tr. 60-61; 276-77). From this evidence a jury could fairly conclude that Coletta, Iovino and Gamaldi continuously received bribes from Steinman during the four-year period charged in the indictment; that the three men were in an equal partnership; and thus, that about one-third of the monies paid by Steinman were received by Coletta and were taxable income for him during those years.

Judge Werker's essential objection to the Government's case was that it lacked specificity. However, the

direct evidence established that Steinman paid the three men approximately \$23,000 per month from June 1968 through 1971. From circumstantial evidence it was apparent that one-third of that sum was paid to the defendant Coletta each month. To the extent that this testimony was imprecise, the imprecision was without legal significance. The Government is not required to prove the precise amount by which a defendant understated or underreported his income. *United States v. Johnson*, 319 U.S. 503, 517 (1934); *United States v. Slutsky*, 487 F.2d 832, 842 (2d Cir.), cert. denied, 416 U.S. 937 (1974); *United States v. Pawlak*, 352 F.Supp. 794, 796 (S.D.N.Y. 1972). See also, *United States v. Rischard*, 471 F.2d 105 (8th Cir. 1973). The Government need only establish that the income was understated by a "substantial" amount and here the test of substantiality was more than met. *United States v. Marcus*, 401 F.2d 563, 565 (2d Cir.), cert. denied, 393 U.S. 1023 (1969). If a jury chose to credit Moe Steinman's testimony, the jury could find that Coletta had omitted to report cash income totally in excess of \$7,000 per month, or \$84,000 per year.\*

Coletta's affirmative act to evade taxes was proven by his filing of a false income tax return. If a jury believed that Coletta received the monies Steinman claims he did, then it could clearly draw the inference that when Coletta failed to report these monies, as was stipulated

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\* Under pertinent case law, it is apparent that this amount of unreported income is "substantial." See, e.g., *United States v. Marcus*, *supra*, (failure to report \$9,000 to \$26,000 per year found to be "substantial"); *United States v. Nunan*, 236 F.2d 576, 585 (2d Cir. 1956), ("a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution"); *United States v. Pawlak*, *supra*, (\$5,000 of underreported income in one year "substantial").



below, he fraudulently understated the taxable income on his return. Such conduct has been held to constitute an attempt to evade the assessment of taxes within the meaning of Title 26, United States Code, Section 7201. *United States v. Stein*, 437 F.2d 775 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971); *United States v. Pawlak*, *supra*.

Finally, the Government's evidence of wilfulness was more than abundant. Coletta's wilfulness was established by his filing income tax returns with knowledge of the unreported income, *United States v. Fahey*, 510 F.2d 302, 306 (2d Cir. 1974); by his failure to advise his accountant of the income, *United States v. Williams*, 470 F.2d 915 (2d Cir. 1972); *United States v. Frank*, 437 F.2d 452 (9th Cir. 1971); and by his dealings in cash, *United States v. White*, 417 F.2d 89 (2d Cir.) *cert. denied*, 397 U.S. 912 (1969); *United States v. Callahan*, 450 F.2d 145 (4th Cir. 1969).

Viewing the Government's case against the reasons set forth by Judge Werker in his memorandum opinion dismissing the indictment, it becomes evident that the applicable legal standards were incorrectly applied. As the first basis of the dismissal, the district court relied on the Government's inability "to document the specifics of who was involved, how much was paid, and where and when payment took place. . . ." (Opinion, 1). This rationale for the dismissal set a higher standard of proof than exists under the statute, which only requires a showing of substantial income received for the year in question. See discussion, *supra*. Furthermore, it failed to give appropriate weight to the direct and circumstantial evidence, set forth *supra*, from which a jury could fairly infer that Coletta received one-third of Steinman's monthly payments, averaging \$7,000 per month, or \$84,000 per year. Likewise, the district court's view that

the Government's case failed to show, even circumstantially, actual receipt of funds by Coletta, ignored the direct and circumstantial evidence on this issue. The record included evidence of a meeting at Coletta's house attended by both Moe and Sol Steinman in which all three buyers divided a bribe between them. From this and the early discussions between Steinman and the three buyers a jury could fairly infer that whichever of the buyers received the bribe during a given month, it was divided equally among the three of them. The dismissal of the indictment on these grounds did not account for such permissible inferences.

Judge Werker also based the dismissal on his view that Moe Steinman's testimony was uncorroborated and nullified on cross-examination. However, this basis for the dismissal ignored the well-established rule that the testimony of an accomplice need not be corroborated to support a guilty verdict. *Caminetti v. United States*, 242 U.S. 470, 495, 37 S.Ct. 192, 61 L.Ed. 442 (1917); *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975); *United States v. Messina*, 481 F.2d 878, 881 (2d Cir.), cert. denied, 414 U.S. 974 (1973); *United States v. Ferrara*, 458 F.2d 868, 871 (2d Cir.), cert. denied, 408 U.S. 931 (1972); *United States v. Phillips*, 426 F.2d 1069, 1071 (2d Cir.), cert. denied, 400 U.S. 843 (1970). Likewise, it failed to leave the assessment of credibility to the jury, as is required under *United States v. Taylor*, supra, 464 F.2d at 245. Even where there are strong reasons for disbelieving a witness, the decision is one for the jury. *United States v. Weinstein*, 452 F.2d 704, 713 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972).

In conclusion, if the testimony of its main witness were believed, the Government's case demonstrated that

the defendant, Coletta, received and failed to report income amounting to over \$80,000 a year from the years 1969, 1970 and 1971, and over \$56,000 for the year 1968. Had the credibility of the Government's witnesses been left for the jury and had the reasonable inferences been drawn upon a review of the evidence, this case, we submit, would have survived a motion for a judgment of acquittal. By failing to review the evidence in the light most favorable to the Government, the district court erroneously concluded that the Government's case should be dismissed.

### CONCLUSION

**The order dismissing the indictment should be reversed.**

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

Musetha Costner, being duly sworn, deposes and says that she is employed in the office of the Strike Force for the Southern District of New York.

That on the 23rd day of September, 1976 she served two (2) copies of the within briefs (Coletta) by placing the same in a properly postpaid franked envelope addressed:

Robert Goldman, Esquire  
800 Third Avenue  
New York, New York

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Musetha Costner

Sworn to before me this

23<sup>d</sup> day of September, 1976

Jacob Laufer

JACOB LAUFER  
Notary Public, State of New York  
(No. 44,400,17)  
Qualified in Kings County  
Commission Expires March 30, 1977